

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II

2016 JUL 22 AM 11:38

STATE OF WASHINGTON

BY

DEPUTY

FILE

STATE OF WASHINGTON

Respondent,

v.

FRANK A. WALLMULLER  
(your name)

Appellant.

No.

48209-6-II

STATEMENT OF ADDITIONAL  
GROUND FOR REVIEW

I, FRANK WALLMULLER, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

APPELLANT CONTENDS THAT SEVERAL OF THE CONDITIONS OF HIS COMMUNITY CUSTODY IMPOSED AS PART OF HIS SENTENCE ARE UNCONSTITUTIONALLY VAGUE, OVERBROAD OR NOT CRIME-RELATED AS DEFINED BY THE WASHINGTON SUPREME COURT CASE: STATE OF WASHINGTON V. ERIC G. BAKL, 164 WN.2D 739, 193 P.3D 678 (2008).

If there are additional grounds, a brief summary is attached to this statement.

Date: July 15, 2016

Signature: Frank A. Wallmuller

# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20<sup>th</sup> day of July, 2016, I CAUSED to be MAILED A TRUE AND CORRECT COPY OF A STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW by placing it in a postage prepaid envelope and placing said envelope into the U.S. MAIL, addressed to the following PERSON(S):

DAVID C. PONZANO, CLERK  
COURT OF APPEALS, DIV. II  
950 BROADWAY, SUITE 300  
TACOMA, WA. 98402

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DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

Frank Wallmuller

STATE V. WALLMULLER, No. 08-1-00305-1  
SENTENCING TRANSCRIPT-12/29/09

1 The sentence on Counts I through V will be three hundred  
2 and eighteen months. As to Count VI, it'll be a hundred twenty  
3 months, and Count VII a hundred twenty months, and Count VIII  
4 and Count IX a hundred and twenty months. The Court will  
5 indicate that the maximum on Counts I through V, in looking at  
6 community custody, is lifetime, and I will assess the  
7 appropriate maximum on the other counts for the community  
8 custody range.

9 There'll be a sexual assault protection order for life for  
10 Teonie, and for Ms. Scott until the year 2019, which is the  
11 maximum. I don't know, Mr. Wallmuller, whether you will ever  
12 be out of custody again based on the Indeterminate Sentence  
13 Review Board, and looking just at the facts that were perceived  
14 - that were shown to the jury, I don't know whether or not that  
15 will include any type of release.

16 If it does, you'll be required to follow all mandatory  
17 conditions, which will include to report and be available for  
18 contact with the assigned community corrections officer, to  
19 work in a Department of Corrections approved education,  
20 employment or community service, to not - to - consume  
21 controlled substances, not to unlawfully - not to possess  
22 unlawfully controlled substances. To pay supervision fees, to  
23 receive prior approval for any change of address, not to use or  
24 own or possess a firearm. In addition, you will not to go to  
25 bars, taverns or lounges or other places whose primary business

1 is the sale of liquor.

2 You will not use or access the internet, including any  
3 cellular devices or any computer modem, without the presence of  
4 a responsible adult who is aware of the conviction. The  
5 defendant shall, at his own expense, submit to random UAs and  
6 breathalyzers. You shall have no contact with minor children  
7 under the age of eighteen, shall not participate in youth  
8 programs, shall not loiter or frequent places where children  
9 congregate, such as parks, video arcades, campgrounds and  
10 shopping malls.

11 Shall enter into and successfully complete a program  
12 offering specialized treatments for problems with sexual  
13 deviance. Shall undergo periodic polygraph and plethysmograph  
14 testing, shall pay for all counseling services and costs  
15 incurred by the victim, and we'll set a restitution hearing.  
16 I'll allow the State to set that once all the information has  
17 come in. Shall submit to HIV testing and DNA fingerprinting.

18 Shall register as a sex offender with the sheriff's office  
19 and pay all legal financial obligations and shall not purchase,  
20 possess or view any pornographic materials, and I'll find that  
21 that is clearly something that's directly related to this case  
22 given the nature of the events in this particular case, and I  
23 mean the videos that were shown to the Court. Shall obey all  
24 laws and to comply with any other conditions imposed by the  
25 Indeterminate Sentence Review Board.

1        Additionally, there are legal financial obligations that  
2 are required, and I'm showing sheriff's return of service of  
3 \$1,227.50, transcripts of \$387.00, a jury fee of \$250.00, a  
4 filing fee of \$200.00, clothing of \$31.28. We have attorney's  
5 fees, which I have not added up.

6                MS. JONES: The clerk did yesterday, Your Honor, and  
7 it was added up at \$7,365.90.

8                THE COURT: Okay. And does that include Mr. Valley's  
9 . . . ?

10               MS. JONES: I believe it includes what's been billed  
11 to date.

12               THE COURT: Alright. So we'll need to reserve on  
13 attorney's fees. Add - incorporate that, but we'll need to  
14 reserve to include - to make sure that we have included Mr.  
15 Valley as well. In addition there is a DNA collection fee of  
16 \$100.00. There is a crime victims of \$500.00.

17               And Mr. Wallmuller, because you took the matter to trial,  
18 you have the right to appeal, and I will provide these copies  
19 to you today for you to sign. Keep in mind that unless the  
20 notice of appeal is filed with the Clerk of the Court within  
21 thirty days of today's date you have lost your right to appeal.  
22 If you have no attorney to file the notice of appeal for you  
23 the Clerk of the Court shall.

24               If you can't afford the cost of an appeal you have the  
25 right to have an attorney appointed to represent you on appeal

1 and to have such parts of the trial record as are necessary for  
2 review of errors transcribed for you.

3 MS. JONES: Your Honor, two questions to clarify the  
4 Court's order. First, the Court mentioned when reciting on the  
5 - Count VI, VII, VIII. The Court said Count IX. It would  
6 actually be Count XII.

7 THE COURT: Count XII, pardon me. Count IX was  
8 not --

9 MS. JONES: And also I believe we need to set, in the  
10 event the defendant is ultimately released, a monthly payment  
11 amount for the legal financial obligations.

12 THE COURT: Set that at \$25.00 a month, sixty days  
13 from date of release. And Mr. Valley, if you could have your  
14 client sign these notice - Oral Notice of Right of Appeal. He  
15 can get one copy and then one copy goes in the court's file.

16 MR. VALLEY: Thank you, Your Honor.

17 Pause.

18 THE COURT: And was there a separate copy of the  
19 community placement and --

20 MS. JONES: There is, but Mr. Valley has it. I can  
21 approach with that unless the Court wants . . .

22 THE COURT: I just want to make sure that we use the  
23 right one.

24 MR. VALLEY: Does he have to sign that?

25 MS. JONES: I don't believe he has to sign that.

prosecuting attorney, constitutes an affirmative acknowledgement of the alleged criminal history. Id. at 928.

Wallmuller did not affirmatively acknowledge his prior criminal history, and the prosecutor's unsupported summary of his alleged prior convictions gleaned from the pages of a prior presentence report is insufficient to establish Wallmuller's prior criminal history by a preponderance of the evidence. State v. Hunley, 175 Wn.2d at 917.

Wallmuller's sentence must be vacated and remanded for resentencing.

02. THE TRIAL COURT ACTED WITHOUT AUTHORITY IN ORDERING WALLMULLER (1) NOT TO GO INTO PLACES WHOSE PRIMARY BUSINESS IS THE SALE OF ALCOHOL, (2) NOT TO USE OR ACCESS THE INTERNET, AND (3) NOT TO PURCHASE, POSSESS OR VIEW PORNOGRAPHIC MATERIALS.

At sentencing, as conditions of community custody, the court, in part, ordered that Wallmuller:

- (12) The defendant shall not go into bars, taverns, lounges, or other places whose primary business is the sale of liquor....
- (13) The defendant shall not use or access the internet (including via cellular devices) or any other computer modem without the presence of a responsible adult who is aware of the conviction, and the activity has been approved by the

Community Corrections Officer and the sexual  
offender's treatment therapist in advance....

- (26) The defendant shall not purchase, possess,  
or view any pornographic materials....

[CP 18-29].

“In the context of sentencing, established case law holds that  
illegal or erroneous sentences may be challenged for the first time on  
appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008)  
(quoting State v. Ford, 37 Wn.2d at 477). This court reviews whether a  
trial court had statutory authority to impose community custody conditions  
de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The conditions of community custody may include “crime-related  
prohibitions.” Former RCW 9.94A.700(5)(e), recodified as RCW  
9.94B.050(5)(e). A “crime-related prohibition” is defined as “an order of a  
court prohibiting conduct that directly relates to the circumstances of the  
crime for which the offender has been convicted....” RCW 9.94A.030(10).

#### 02.1 Frequent Places Selling Liquor

There was no evidence at trial that alcohol  
played any part in Wallmuller's crime. In State v. Jones, 118 Wn. App.  
199, 76 P.3d 258 (2003), the defendant pleaded guilty to several offenses  
and the court imposed conditions of community custody relating to  
alcohol consumption and treatment. As here, nothing in the record



indicated that alcohol contributed to Jones's offenses. Id. at 207-08. This court found that although the trial court had authority to prohibit consumption of alcohol, it did not have the authority to order the defendant "to participate in alcohol counseling(,)" Id. at 208, reasoning that the legislature intended a trial court to be able "to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense." Id. at 206. In contrast, when ordering participation in treatment or counseling, the treatment or counseling must be related to the crime. Id. at 207-08; see also State v. McKee, 141 Wn. App. 22, 34, 167 P.3d 575 (2007) (community custody provisions prohibiting purchasing and possession of alcohol invalid where alcohol did not play a role in the crime), reviewed denied, 163 Wn.2d 1049 (2008). And while RCW 9.94A.703(3)(e), authorizes the sentencing court to order that an offender refrain from consuming alcohol, there is no such authority forbidding an offender from frequenting places whose primary business is the sale of liquor, sans any evidence and argument that it qualifies as a crime-related prohibition under RCW 9.94A.703, which constitutes "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted...." RCW 9.94A.030(10).

The condition prohibiting Wallmuller from frequenting places selling liquor is invalid because there was no evidence that alcohol played

any part in her offense, with the result that it is not a crime-related prohibition and must be stricken.

#### 02.2 Use or Access Internet

Since there was no evidence that access to the internet was crime related to Wallmuller's convictions, this condition must be stricken. See State v. O'Caine, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (striking condition prohibiting internet access for lack of evidence that it was crime related).

#### 02.3 Pornographic Materials

The term "pornography" or "pornographic material" is unconstitutionally vague. State v. Bahl, 164 Wn.2d at 754-56. In State v. Sansone, 127 Wn. App. 630, 638-641, 111 P.3d 1251 (2005), Division I of this court held that such a condition<sup>2</sup> violated due process because it was unconstitutionally vague.

Additionally, in Bahl, our Supreme Court held that pre-enforcement challenges to similar conditions were properly raised, even if it was left to a third party to determine what satisfied the condition. Bahl, 164 Wn.2d at 754-52, 758.

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<sup>2</sup> Sansone was "not (to) possess or peruse pornographic materials unless given prior approval by (his) sexual deviancy treatment specialist and/or (CCO). Pornographic materials are to be defined by the therapist and/or (CCO)." Sansone, 127 Wn. App. 642-43.

Here, because the condition does not define pornography and is thus unconstitutionally vague, it must be stricken. See State v. Sansone,  
127 Wn. App. at 643.

03. WALLMULLER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO THE SENTENCING COURT'S CALCULATION OF HIS OFFENDER SCORE.<sup>3</sup>

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

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<sup>3</sup> While it has been argued in the preceding section of this brief that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

*b) Standard of Review*

An “illegal or erroneous sentence may be challenged for the first time on appeal.” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). A trial court may only impose a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). On appeal, review is de novo as to whether a trial court exceeded its statutory authority in imposing a community custody condition. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

*c) Argument and analysis.*

The State respectfully concedes that the trial court lacked authority to impose the community custody conditions that Wallmuller challenges in this CASE.

In addition to statutorily mandated community custody conditions, Washington sentencing statutes provide a trial court with discretion to impose crime-related prohibitions. *See* RCW 9.94A.703(3)(f). A “[c]rime-related prohibition” is defined in relevant part as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). None of Wallmuller’s challenged community custody conditions are statutorily mandated; therefore, the conditions must prohibit conduct directly related to the circumstances of convictions to be valid as crime-related prohibitions.

In the instant case, there is no evidence that Wallmuller’s patronage of bars or taverns contributed to his offenses. Therefore, the trial court lacked statutory authority to prohibit Wallmuller from entering “bars, taverns, lounges, or other places whose primary business is the sale of liquor.” CP at 18. See, *State v. Jones*, 118 Wn. App. 199, 207-208, 76 P.3d 258 (2003).

Next, the State concedes that the trial court’s community custody condition prohibiting Wallmuller from purchasing, possessing, or viewing pornographic material (CP at 19) is unconstitutionally vague. *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008).